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December 8, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: PR Docket No. 89-552, GN Docket No. 93-252
Use of the 220-222 MHz Band by the Private Land Mobile Radio Service

Dear Mr. Caton:

On behalf of US MobilComm, Inc. ("USMC"), this is to notify the Commission that David Elkin, President of USMC, and the undersigned had a series of *ex parte* meetings with the following people on December 5, 1995: Ruth Milkman from the Office of the Chairman, Rudy Baca from the Office of Commissioner Quello, Lisa Smith from the Office of Commissioner Barrett, David Siddall from the Office of Commissioner Ness, and David Furth and Suzanne Toller from the Office of Commissioner Chong. In addition, the undersigned had a telephone conversation with John Cimko, Chief of the Policy Division of the Wireless Telecommunications Bureau on December 7, 1995.

In the meetings we supported the Comments of the American Mobile Telecommunications Association, Inc. ("AMTA") filed on September 13, 1995 in response to the *Fourth Notice of Proposed Rulemaking* as well as the Reply Comments of USMC filed on September 27, 1995. We pointed out that the parties to the proceeding unanimously supported the AMTA proposal and did not support the proposal as issued in the *Fourth Notice*.

In addition to the reasons discussed in AMTA's comments and USMC's reply comments, we explained that the Commission should adopt a unanimous industry proposal unless there is a compelling public interest reason not to. During the course of the various discussions only two reasons were suggested by Commission personnel against adoption of the AMTA proposal. One was that the AMTA proposal, which would limit participation in the modification window to existing licensees, would interfere with the *Ashbacker* rights of non-licensees. The other was that modifications resulting in a change of service area would deprive prospective auction bidders of the right to bid for those areas in the auction.

***Ashbacker* is a red herring.**

In response to the *Ashbacker* question, we explained that the Commission can always set eligibility standards when accepting applications for filing. In this case, the window would be limited to existing licensees who wish to modify their systems without causing interference to any other licenses. (By limiting a move in the direction of a co-channel station to half the difference between the actual separation and the minimum 75 mile separation, the AMTA proposal avoids any possibility of mutually exclusive applications being filed.) In reality, a new applicant would be unable to file an application that would be mutually exclusive with an application for a modified area because all applications that could be granted without causing separation problems were granted after the initial lottery. In other words, drop-in space does not exist except for rural areas, and modification applications are in reality limited to co-channel separation distances.

In any event, there are numerous instances of the Commission limiting eligibility to a particular class of applicant based on the service already provided by the applicant. For example, when the Commission licensed the entire cellular spectrum, it limited eligibility for half of the spectrum to existing providers of local exchange service. After the initial licensing process, it adopted rules to permit existing cellular licensees to expand their cellular geographic service area to any part of their initial market for five years without being subject to mutually exclusive applications. The Commission also increased the amount of spectrum for each cellular carrier from 20 MHz to 25 MHz by rulemaking. Similarly, the Commission intends to give first rights to HDTV spectrum to existing holders of TV licenses. (Alternatively, as explained by Robert B. Kelly in his *ex parte* letter of December 6, 1995, the Commission does not have an *Ashbacker* problem because it can define the difference between a major and a minor modification, and minor modifications are not subject to mutually exclusive applications.)

The AMTA proposal best preserves the value of the 220 MHz spectrum for a future auction.

In response to the concern that the AMTA proposal would result in modifications that would take away valuable spectrum from a future auction, we stressed that the "white space" available at auction would not be compromised because the coverage that might be gained in one direction as a result of a move would be lost in another direction. More importantly, however, the modification process will have only a small effect on the big picture because the modification process will result in small changes only. Even in instances where a licensee moves the maximum distance as proposed by AMTA, most of the old service contour would still be overlapped by the new service contour. In any event, the public interest would be served by the AMTA proposal because customers would be getting better service from omnidirectional antennas than they would get from directional antennas, which would be used to keep the new service area within the old service area.

We explained that the Commission would have a better auction, with applicants bidding more aggressively if the AMTA proposal is adopted. If licensees are given the freedom to make the modifications that they see as necessary to best configure their systems, they will be able to provide better service to customers and thus will be more successful in their businesses. Business success will bring in the funds necessary to bid in the auction. On the other hand, if the ability to serve customers is stifled, as it would be by the proposal in the *Fourth Notice*, applicants may not be able to obtain the backing needed to bid in the auction. Not only would current licensees and managers be discouraged from bidding, but prospective new entrants would be discouraged also, because they would see the spectrum as doomed to failure. In other words, the Commission needs to adopt the proposal that would best assure industry success, or everyone loses. And the biggest losers are the customers, because they will be unable to obtain inexpensive dispatch service, which is no longer being offered in the 800 MHz SMR spectrum.

There are right now only two manufacturers of 220 MHz equipment in the entire world. Industry failure now could result in them dropping the 220 MHz product line. This was the case in IVDS, which like 220 MHz, has a tortured regulatory history. Right now, IVDS licensees cannot get equipment and programming to provide service because the original proponents of IVDS simply gave up. The Commission must do what it can to ensure the success of the 220 MHz industry by adopting the AMTA proposal. Adopting the *Fourth Notice* proposal because the Commission believes in theory that it would give a better opportunity to newcomers would doom the industry to failure, result in a host of litigation problems that would adversely affect the auction, and leave incumbents and newcomers alike with nothing.

Please address any questions to the undersigned.

Sincerely,

Eliot J. Greenwald

EJG:jfj

cc: Chairman Reed E. Hundt (Room 814)
Commissioner James H. Quello (Room 802)
Commissioner Andrew C. Barrett (Room 826)
Commissioner Susan Ness (Room 832)
Commissioner Rachelle B. Chong (Room 844)
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Michele C. Farquhar, Chief Wireless Telecommunications Bureau (Room 5002)
Ralph Haller, Deputy Chief, Wireless Telecommunications Bureau (Room 5002)
John Cimko, Jr., Chief Policy Division, Wireless Telecommunications Bureau (Room 5002)
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